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CASE NUMBER

IN THE

Supreme Court of the United States

October Term, 1984

FEDRICO LUNA,

Petitioner,

v.

HOUSE OF SOFAS

&

CITIZENS COMMERCIAL SAVINGS BANK,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In an action under the Truth In Lending Act in which plaintiff was successful should the attorney fee award fully compensate plaintiff's counsel for all time reasonably expended pursuing the matter.

A related and included question is whether the summary judgment granted to defendant on plaintiff's original Truth In Lending Act claims was correctly decided.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS DELIVERED IN THE COURTS BELOW	1
STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED	1
STATUTES AND REGULATIONS WHICH THE CASE INVOLVES	2
STATEMENT OF THE CASE	6
ARGUMENT	9
CREDITOR STATUS	15
REPOSSESSION	17
AMOUNT OF AWARD	18
AMOUNT OF COMPENSATION — *McGOWAN* AND *POSTOW* CASES	19
DEPOSITION COSTS	21
ATTORNEY FEE REQUEST	21
CONCLUSION	23
APPENDIX:	
OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS	25
OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN	28
COPY OF THE ORDER DENYING REHEARING EN BANC	31

TABLE OF AUTHORITIES

Page

CASES:

Cenance v *Bohn Ford*, 430 F. Supp. 1064 (1977) 15, 16

Conley v *Gibson*, 355 U.S. 41 (1957) 12, 14

Ford Motor Credit Company v *Janet Cenance*, 452 U.S. 155 (1981) 15, 16

Hensley v *Eckerhart*, 103 S.Ct. 1933 (1983) 23

L'Orange v *Medical Protective Company*, 394 F.2d 57 (6th Cir. 1968) 13, 14

McGowan v *Credit Center of Jackson, Inc.*, 546 F.2d 73 (5th Cir. 1977) 10, 14, 20, 21

McGowan v *King, Inc.*, 661 F.2d 48 (5th Cir. 1981) 22

Northcross v *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979) 23

Postow v *OBA Federal Savings and Loan*, 627 F.2d 1370 (D.C. Cir. 1980) 10, 14, 20, 21, 23

STATUTES:

15 U.S.C. 1602 2

15 U.S.C. 1640(a)(3) 2, 3, 10

15 U.S.C. 1640(e) 3, 6

M.C.L. 445.853 . . . . . 2, 3

M.C.L. 445.864(c) 2, 3

M.C.L. 445.868 . . . . . 2, 4, 10

REGULATIONS:

12 C.F.R. 226.4(a)(5)(ii) 2, 4, 11, 14

Page

12 C.F.R. 226.6(c) 2, 5

12 C.F.R. 226.6(d) 2, 5, 16

12 C.F.R. 226.8(a) 2, 5, 16

TREATISE:

WRIGHT AND MILLER,
FEDERAL PRACTICE AND PROCEDURE . . . 13, 14

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Sixth Circuit Court of Appeals is unreported as is the District Court opinion. Copies of both opinions are included in the appendix to this petition.

STATEMENT OF THE GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

This petition for writ of certiorari to the Sixth Circuit is based on the judgment entered on September 13, 1984

issued as mandate on November 6, 1984. Appellant's timely petition for hearing en banc was denied on October 29, 1984.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1) which reads:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTES AND REGULATIONS WHICH THIS CASE INVOLVES

This case involves the following statutes: 15 U.S.C. 1602, 15 U.S.C. 1640(a)(3), 15 U.S.C. 1640(e), M.C.L. 445.853, M.C.L. 445.864(c), M.C.L. 445.868 and the following regulations: 12 C.F.R. 226.4(a)(ii), 12 C.F.R. 226.6(c), 12 C.F.R. 226.6(d), and 12 C.F.R. 226.8(a).

15 U.S.C. 1602(e) and (f) provides:

> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
>
> (f) The term "creditor" refers only to creditors who regularly extend or arrange for the extension of credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required whether in connection with loans, sales of property or services, or otherwise. . . .

15 U.S.C. 1640(a)(3) reads:

> Civil Liability
>
> (a) . . . Any creditor who fails to comply with any requirement imposed under this chapter . . . with respect to any person is liable to such person in an amount equal to
>
> * * *
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. 1640(e) provides jurisdiction as follows:

> (e) Any action under this section may be brought in any *United States district court* or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

M.C.L. 445.853 provides:

> Each retail installment contract shall be in writing, dated, signed by the retail buyer or the authorized representative of the retail buyer and completed as to all essential provisions.

M.C.L. 445.864(c) provides:

> No retail installment contract or retail charge agreement shall contain any provision by which:
>
> (c) The seller or holder or other person acting on his behalf, is given authority to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of goods.

M.C.L. 445.868 provides:

> Any seller who enters into any contract or agreement which does not comply with the provisions of this act or who violates any provision of this act except as a result of accidental or bona fide error is barred from the recovery of any time price differential, any official fees, delinquency or collection charge, attorney fees, or court costs and the buyer shall be entitled to recover his *reasonable attorney fees* and court costs from the seller or his assigns.

12 C.F.R. 226.4(a) provides as follows:

> SECTION 226.4 —
> DETERMINATION OF FINANCE CHARGE
>
> (a) General rule. Except as otherwise provided in this section, *the amount of the finance charge* in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:
>
> * * *
>
> (5) Charges or premiums for credit life, accident, health, or loss of income insurance, written in connection with any credit transaction *unless*
>
> (i) the insurance coverage is not required by the creditor and this fact is clearly

and conspicuously disclosed in writing to the customer; and

(ii) any customer desiring such insurance coverage *gives specifically dated and separately signed affirmative written indication of such desire* after receiving written disclosure to him of the cost of such insurance.

12 C.F.R. 226.6(c) provides:

(c) Additional information. At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required by this Part to be disclosed. . . .

12 C.F.R. 226.6(d) reads:

(d) Multiple creditors or lessors; joint disclosure. If there is more than one creditor or lessor in a transaction, each creditor or lessor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer or lessee. If two or more creditors or lessors make a joint disclosure, each creditor or lessor shall be clearly identified.

12 C.F.R. 226.8(a) provides:

SECTION 226.8 —
CREDIT OTHER THAN OPEN END DISCLOSURES

(a) General rule. Any creditor when extending credit other than open end credit shall in ac-

cordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as otherwise provided in this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature.

* * *

STATEMENT OF THE CASE

The case before this Court in this petition for writ of certiorari to the Sixth Circuit Court of Appeals was originally filed in the Federal District Court for the Eastern District of Michigan on November 14, 1980.

Federal jurisdiction is granted by the Truth In Lending Act. 15 U.S.C. 1640(e), *supra*.

Plaintiff raised the Truth In Lending claims and pendent state Retail Installment Sales Act and Consumer Protection Act claims against the original defendants. The House of Sofas sold some items of furniture to Mr. Luna. Citizens Bank provided financing. The combined retail installment sales contract and Truth In Lending disclosure form was printed by Citizens Bank.

The House of Sofas was referred to as a dealer by Citizens Bank management. House of Sofas people called the bank for approval of a loan before completing an installment sales agreement on a Citizens Bank form where financing was to be provided by Citizens Bank.

The House of Sofas in Michigan is no longer in business. An Arizona corporation, House of Sofas, a possible successor to the House of Sofas in the instant suit, settled their potential liability by a payment of $500. The suit continued then with Citizens Bank as the only defendant.

Plaintiff amended his complaint to assert a class action, order dated May 19, 1981. Plaintiff's second motion to allow the suit to be maintained as a class action was filed on June 26, 1981. Subsequently, on July 7, 1981, defendant Citizens Bank moved to amend their answer to assert a statute of limitations defense. Discovery at that time showed a potential class size of 941 House of Sofas customers to whom credit had been extended by Citizens Bank. The potential class size was considered manageable by plaintiff's counsel. The larger class of all customers of all dealers of Citizens who had been extended credit on the same form as plaintiff was potentially beyond the resources of plaintiff's counsel to manage. Citizens Bank had 98 dealers. Fifty thousand copies (50,000) of form 1310-2 had been printed. Citizens had extended credit to 30,000 persons on that form through its dealer merchants.

The District Court allowed defendant's amendment to assert their statute of limitations defense. The potential class size of House of Sofas was then reduced to only Mr. Luna since the House of Sofas had gone out of business more than a year before plaintiff's amendment to allege a class action. Plaintiff did not pursue the larger

class. The matter, therefore, proceeded as an individual action by Mr. Luna against Citizens Bank.

The bank denied generally plaintiff's allegations and resisted discovery. Plaintiff filed motions to compel answers to interrogatories and deposed a bank official for information regarding relations between the House of Sofas and Citizens Bank. Plaintiff pursued the House of Sofas, possible successors, and individuals behind the House of Sofas corporation.

Defendant moved for summary judgment on January 29, 1982. Plaintiff moved to amend his complaint on March 29, 1982. The District Court allowed defendant's motion for summary judgment on all plaintiff's Truth In Lending claims on November 15, 1982.

Plaintiff's revised amendment to his complaint was allowed on February 15, 1983. Plaintiff's motion for summary judgment, filed May 12, 1983, was referred to a magistrate for hearing and recommending disposition. At that hearing, defendant Citizens Bank admitted liability under the Truth In Lending Act for $1000 statutory damages. Plaintiff acknowledged that his consumer protection act claim for relief against defendant Citizens Bank would not prevail. Then Citizens Bank acknowledged liability under the Retail Installment Sales Act which provides liability against seller or assigns. The time price differential for which defendant was liable was rounded to $65. A sum of $35 was added as interest to date of judgment for a total of $1100. The $500 received from the House of Sofas was deducted, leaving a balance of $600. The parties stipulated to a judgment in that amount. Costs and reasonable attorney fees under the Truth In Lending Act and Retail Installment Sales Act were left to be decided by the magistrate after plaintiff's counsel prepared and filed his time sheets and supporting materials, and after briefs were filed.

The District Court Judge, however, withdrew sua sponte the reference to the magistrate. The court reviewed the attorney fee statement and briefs on costs and attorney fees. The court then allowed attorney fees only for the period after plaintiff's last amendment to his complaint which was prepared and filed on November 29, 1982.

Fees were allowed for only 18 hours of the 166 hours requested. Deposition costs and phone calls before November 29, 1982 were disallowed. Compensation was allowed at a rate of $95 per hour.

The questions presented in this petition relate to the value of work performed by plaintiff's counsel. The record of the case is essential to a proper understanding of the case. Plaintiff, therefore, will request that the record be certified and transmitted to this Court.

ARGUMENT

Review on writ of certiorari should be granted in this matter for special and important reasons. The Sixth Circuit Court of Appeals has rendered a decision in conflict with the decisions of the Fifth Circuit Court Of Appeals and the District Of Columbia Circuit Court Of Appeals. Furthermore, the Sixth Circuit Court Of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the Federal District Court for the Eastern District of Michigan so as to call for exercise of this Court's power of supervision.

Plaintiff prevailed in this action in federal district court and, under the Truth In Lending Act, should be awarded attorney fees for the time spent litigating all claims of violations of the Truth In Lending Act and Retail Install-

ment Sales Act. Both the Fifth Circuit and the District Of Columbia Circuit have so ruled in *McGowan* v *Credit Center of North Jackson, Inc.*, 546 F.2d 73 (5th Cir. 1977) and *Postow* v *OBA Federal Savings and Loan*, 627 F.2d 1370 (D.C. Cir. 1980). The *Postow* court, in affirming an award of attorney fees for time spent on a count on which plaintiff did not prevail, noted that:

> We note that the only other court of appeals to have addressed this issue agrees with our conclusion although on different grounds. In *McGowan*, supra, the court of appeals vacated and remanded a district court decision which substantially reduced a request for attorney's fees in a Truth-in-Lending case "because the plaintiff's attorney had been successful 'in only one minor charge'."

The decision of the Sixth Circuit in the instant case is therefore in conflict with the decisions of the other federal courts of appeals. Supreme Court Rule 17.1(a).

The Sixth Circuit affirmed in this case a district court ruling which allowed compensation for only 18 hours of 166 hours spent by plaintiff in pursuing successfully the district court suit based on Truth In Lending Act violations and a pendent state Retail Installment Sales Act violation. Full compensation for counsel's efforts at the district court and on appeal should be ordered.

Plaintiff prevailed on an amendment to his original complaint and thus was successful under the Truth In Lending provision for attorney fees, 15 U.S.C. 1640(a)(3), *supra*, and the Retail Installment Sales Act provision for reasonable attorney fees and court costs, M.C.L. 445. 868, *supra*. The court claimed that the Truth In Lending Claim was not asserted until late in the proceedings; therefore, it only allowed partial fees. The court made

no allegation that the Retail Installment Sales Act claim, which in fact was the same claim (no date on the disclosure statement-sales contract), had not been asserted in plaintiff's original complaint.

Paragraph 8 of plaintiff's complaint as filed on November 14, 1980 reads:

> 8. That defendants failed to make the required disclosures under 15 U.S.C. 1601 et seq and the regulations thereunder 12 C.F.R. 226 et seq.

Paragraph 14 of plaintiff's complaint reads:

> 14. The contract is not dated as required by M.C.L. 445.853.

The disclosure statement (Citizens Bank Form 1310-2 Rev 5-79) was appended to the complaint as alleged in Paragraph 18 and constituted part of plaintiff's factual allegations.

> 18. In the instant transaction Plaintiff and Defendant House of Sofas executed a document entitled ORIGINAL RETAIL INSTALLMENT CONTRACT on or about November 18, 1979. That document is attached to this contract and labeled Exhibit A.

Defendant Citizens Bank acknowledged on May 20, 1983, that the request for credit life insurance was not specifically dated and, therefore, Citizens Bank was liable even as an assignee for the violation of Regulation 12 C.F.R. 226.4(a)(5)(ii) promulgated under the Truth In Lending Act.

It is clear that plaintiff alleged that the contract was undated in his original complaint. The Federal Rules of Civil Procedure, Rule 8(a)(2), require that "a pleading which sets forth a claim for relief . . . contain . . . a

short and plain statement of the claim showing that the pleader is entitled to relief . . ."

In *Conley* v *Gibson*, 355 U.S. 41 (1957), the court ruled:

> [W]e hold that under the general principles laid down in the Steele, Graham, and Howard Cases the complaint adequately set forth a claim upon which relief could be granted. In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> * * *
>
> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.[9]

---

[9] See e.g. Rule 12(e) (motion for a more definite statement); Rule 12(f) (motion to strike portions of the pleadings); Rule 12(c) (motion for judgment on the pleadings); Rule 16 (pre-trial procedure and formulation of issues); Rules 26-37 (depositions and discovery); Rule 56 (motion for summary judgment); Rule 15 (right to amend).

> Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis.

Wright and Miller's treatise on Federal Practice and Procedure comments at section 1216 that:

> A reading of Garcia, Conley and a host of other cases suggests that the complaint and other relief-claiming pleadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the actions is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly can be drawn that evidence on these material points will be introduced at trial.

Plaintiff's original complaint, which stated in Paragraph 14 that the contract was undated and in Paragraph 8 that the defendants failed to make the required disclosures under the Truth In Lending Act and regulations thereunder, clearly gave fair notice of the claim on which plaintiff prevailed. The disclosure form was attached so the complaint contained direct allegations on every material point necessary to sustain a recovery on the suggested legal theory, even though Wright and Miller comment that the legal theory need not be the theory suggested or intended by the pleader.

The Sixth Circuit in the case of *L'Orange* v *Medical Protective Company*, 394 F.2d 57 (6th Cir. 1968) stated that "For purposes of determining whether a cause of action

has been stated the complaint will be liberally construed". Plaintiff's complaint under *Conley*, Wright and Miller's analysis, and the *L'Orange* case states a claim for relief under F.R.C.P. 8(a).

Plaintiff filed a motion to amend his complaint on March 23, 1982. One of the amendments was to add the following citation to paragraph 14, "12 C.F.R. 226.4(a)(5)(ii)". The motion served to emphasize the particular subparagraph of Regulation Z that was violated by the lack of a date on the request for credit life insurance.

The court allowed defendant's motion for summary judgment on all Truth In Lending Act claims on November 15, 1982 and allowed plaintiff to amend his complaint. Plaintiff filed a substitute amendment which inserted paragraph 14a, which read:

> 14a. The expression of the customers desire for insurance coverage is not specifically dated as required by 12 C.F.R. 226.4(a)(5)(ii).

Other violations of the Truth In Lending Act were also cited in this amendment. Defense counsel claimed and the district court ruled that the amendment alleged a new claim for relief; therefore, no attorney fees were allowed for the time spent prior to November 29, 1982, which was the date that plaintiff's counsel began work on the revised amendment regarding the undated request for credit life insurance.

The ruling was an abuse of discretion under the rule of the *McGowan* and *Postow* cases. The Truth In Lending claims constitute a single action for purposes of the attorney fee provision of the Truth In Lending Act under the *Postow* case, *supra*. Award of less than full compensation is inconsistent with the Congressional goals under *McGowan, supra*.

From the argument presented it is clear the claim upon which plaintiff prevailed was asserted in the original complaint filed in November of 1980. Defendant had fair notice that the contract was undated. The District Court erroneously allowed defendant's motion for summary judgment on November 15, 1982.

Assuming, arguendo, that plaintiff did not raise the issue of the lack of a date on the disclosure statement in his original complaint or file his amendment of November 29, 1982, there were other violations of the Truth In Lending Act on which the court ruled incorrectly. If the District Court ruled incorrectly on the Truth In Lending claims on November 15, 1982, then the court's stated reasons for not fully compensating plaintiff's counsel are no longer valid. There is no indication that the Sixth Circuit reviewed the plaintiff's other Truth in Lending Act claims.

A review of the most compelling of plaintiff's Truth In Lending Act claims follows.

CREDITOR STATUS

Plaintiff alleged that defendant Citizens Bank extended credit to plaintiff and was a creditor under the Truth In Lending Act. As a creditor their status had to be disclosed on the front of the disclosure statement, 12 C.F.R. 226.6(d), 12 C.F.R. 226.8(a)(1); *Cenance* v *Bohn Ford*, 430 F. Supp. 1064 (1977); and *Ford Motor Credit Company* v *Janet Cenance*, 452 U.S. 155 (1981).

Citizens Bank provided the disclosure form to the seller House of Sofas. The merchants with whom Citizens regularly dealt were referred to as dealers. If a buyer wished financing through Citizens Bank from dealer House of Sofas, a Citizens Bank form was used and approval was obtained from Citizens Bank before

credit was extended. Citizens Bank's status as a creditor in the instant transaction, although clear from the beginning of this suit, was steadfastly denied by defendant Citizens Bank. As a creditor they had to be clearly identified, 12 C.F.R. 226.6(d), on the front of the disclosure document, 12 C.F.R. 226.8(a)(1). Although the *Cenance* case accepted disclosure as an assignee as adequate notice of creditor status, the Ford Motor Credit disclosure was on the front of the disclosure form while in the instant case the notice of assignment to Citizens Bank is on the back near the bottom in fine print.

In *Janet Cenance* v *Bohn Ford and Ford Motor Credit Co.*, 430 F. Supp. 1064, 1068 (1977), the court states that the notice of assignment to Ford Motor Credit Company occurs at the bottom of the disclosure form. The Supreme Court, in *Ford Motor Credit Co* v *Janet Cenance, supra*, refers to the legend:

> The foregoing contract hereby is accepted by Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

The Court's use of the word "legend" indicates a certain boldness. In the instant case, the notice of assignment and the name of Citizens Bank are not bold but obscure; they are located on the back of the disclosure form near the bottom of a full page of fine print.

In contrast to *Cenance, supra*, where a meaningful disclosure was made on the face of the document, the notice of assignment in this, the *Luna* matter, is obscure. Citizens' is not clearly identified as a creditor as required by 12 C.F.R. 226.6(d). Their name and status does not appear in a meaningful fashion along with the other required disclosures.

REPOSSESSION

The disclosure statement includes, on its back, provision for repossession upon default. State law prohibits contract provisions giving seller or holder authority to enter buyer's premises unlawfully or to commit any breach of the peace in repossession. The purported authority and right to enter debtor's premises with or without process of law to take possession of the security upon default appears to be a four-square violation of the state Retail Installment Sales Act. If so or if not, it is at least a provision that misleads and confuses the customer as to the rights which the secured party may claim in a contract provision, since the provision appears to give the secured party rights which it is prohibited from seeking under state law.

Paragraphs 10, 11 and 12 of the original complaint read as follows:

> 10. Paragraph (2) on the back of the document (attached) states that upon default "the secured party shall thereupon have the right to enter any of the premises of said debtor with or without process of law, and take possession of, remove and sell said property."
>
> 11. The above stated language is a violation of M.C.L. 445.884(c) which prohibits any provisions in retail installment sale contracts whereby "The seller or holder or other person acting on his behalf is given authority to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of goods."
>
> 12. The Code of Federal Regulations 12 C.F.R. 226.6(c) prohibits "additional information . . . stated . . . so as to mislead or confuse the

customer." Paragraph (2) of the document which purports to allow unlawful entry is thereby misleading the customer as to his legal rights.

The provision of the contract cited in Paragraph 10 above is clearly intended to make the purchaser believe in the appropriate circumstances that either the seller or the bank can enter debtors' premises unannounced and take the debtors' furniture or other collateral. Obviously, neither the seller nor the bank can commit such act under color of contract provision in the state of Michigan. The provision misleads and confuses the purchasers as to their legal rights, violating 12 C.F.R. 226.6(c), which prohibits "additional information stated so as to mislead or confuse the customer."

The District Court ruled in defendant's favor on this point. The Court of Appeals affirmed without noting whether they reviewed this point which was briefed at the Court of Appeals.

AMOUNT OF AWARD

Making the assumption, for the sake of argument only, that the District Court could begin calculating the attorney fee award based on the date on which plaintiff's counsel began work on his amendment, which contained the allegation to which defendant assented, the court erred in determining the day on which plaintiff's counsel began work on the amendment.

The District Court allowed attorney fees for 18 hours of attorney time from November 29, 1982, the date on which plaintiff's counsel began working on a revision of his motion to amend related to the undated request for credit life insurance. However, March 16, 1982 was the date on which counsel for plaintiff began work on the

motion to amend relating to the lack of a date on the request for credit life insurance. Thus, even if the limitation imposed by the District Court were allowable, the time allowed should include counsel's efforts from March 16, 1982 to November 29, 1982, an additional 40.5 hours.

During this period of time plaintiff's counsel served the House of Sofas in Arizona and negotiated a settlement of their claim for $500. Defendant received credit for the $500 when the liability to plaintiff was reduced in the stipulation from $1100 to $600. The time spent by counsel for plaintiff resulted in the benefit to defendant Citizens Bank; therefore, compensation should be allowed for that work done by plaintiff's counsel. Calculation of compensable time, even under the District Court's ruling, should begin March 16, 1982, first, since work began on the amendment regarding the undated request for credit life insurance on that date, and secondly, since defendant was enriched by plaintiff's counsel's efforts in settling with the House of Sofas in Arizona during the time from March 16, 1982 to November 29, 1982.

The District Court allowed compensation for plaintiff's counsel at the rate of $95 per hour; 40.5 hours at $95 per hour amounts to $3847.50.

Thus, even if the award were to be limited to the period after plaintiff began work on the amendment, the award should be increased by $3847.50.

AMOUNT OF COMPENSATION – *McGOWAN* AND *POSTOW* CASES

In plaintiff's supplementary brief of June 28, 1983, regarding attorney fees, compensation for 166 hours was requested. The court allowed compensation for 18 hours at $95 per hour, $1710. Using the court's rate of $95 per

hour, plaintiff's counsel should be awarded $15,770 as full compensation for his successful efforts in this suit.

In *Postow* v *OBA Federal Savings and Loan Association*, 627 F.2d 1370 (D.C. Cir. 1980), the court allowed $18,150.05 in attorney fees of the $21,452.25 requested, even though defendants argued that no fees should be awarded for time spent on a Truth In Lending Count on which plaintiffs were unsuccessful. The D.C. Circuit noted that:

> The legislation at issue here was specifically designed to be enforced through private citizens' suits.
>
> * * *
>
> [A]lleged multiple failures to disclose . . . [give] rise to grounds only for a single action . . . to recover statutory damages . . . . [Plaintiffs] could not have been more "successful" in their pursuit of damages than they were . . .
>
> * * *
>
> We note that the only other court of appeals to have addressed this issue agrees with our conclusion although on different grounds.
>
> In *McGowan*, supra, the court of appeals vacated and remanded a district court decision which substantially reduced a request for attorney's fees in a Truth In Lending case "because the plaintiff's attorney had only been successful 'in only one minor charge.'" We agree with the Fifth circuit's conclusion in *McGowan* that the enforcement of this Act should not be so restricted, because of its purpose:
>
> > The Congressional goals underlying the Truth In Lending Act include the creation of

> a system of private attorneys general to aid in effective enforcement of the Act. [Citations omitted]. The reduction of an award of attorney's fees from the amount sought solely because the plaintiff was successful on only one of the several charges would be inconsistent with the Congressional policy of implementing enforcement of the Truth In Lending Act. *McGowan* v *Credit Center of North Jackson*, 546 F.2d 73 (5th Cir. 1974)

DEPOSITION COSTS

In the instant case the District Court did not allow deposition costs and some other expenses, the deposition of a bank vice-president was taken by plaintiff. The deposition was directed primarily at the issue of the bank's relationship with the House of Sofas. Its cost was $95.95. In *Postow, supra*, the D.C. Circuit reversed the district court on the issue of deposition costs and remanded for an appropriate determination on the Postows' claim for reimbursement of deposition costs.

ATTORNEY FEE REQUEST

In pursuing the class action early in the development of this suit, plaintiff moved to certify a class of potentially 941 members (House of Sofas-Citizens Bank Customers) on July 26, 1981. On July 7, 1981, defendants moved to amend their answer to allege the affirmative defense of statute of limitations. The court allowed defendant's motion to amend on January 11, 1982. The assertion of the statute of limitations eliminated the class that plaintiff had attempted to certify. The District Court therefore denied plaintiff's motion for class certification. Although there was a potential class of 30,000 class members, individuals to whom Citizens Bank extended

credit through their merchant dealers on Form 1310-2, a class of that size was possibly beyond the resources of plaintiff's counsel.

The vigorous defense by defendant made the complex lawsuit an arduous undertaking. Plaintiff made an offer to defendant on January 30, 1981, to settle for $1300 to plaintiff and $905 to plaintiff's counsel for attorney fees. On January 13, 1982, another written offer to settle was made; this time, plaintiff offered to settle all civil liability including attorney fees for $3000. Plaintiff, therefore, did not seek to protract the litigation, but rather sought to settle it. In *McGowan* v *King, Inc.*, 661 F.2d 48 (5th Cir. 1981), the court commented:

> The borrower's counsel did not inflate this case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents.
>
> 661 F.2d 48, 51 (1981)

* * *

> The Truth In Lending Act was not intended to be an endowment for lawyers but neither was it designed to impose a pro bono sacrifice upon lawyers who undertake such cases.

* * *

> Congress sought to create a system of private attorneys general to aid in the effective enforcement of the Act. [Citations omitted] The fees awarded should be adequate to achieve that purpose.
>
> 661 F.2d 48, 52 (1981)

The award in *Postow, supra,* was $18,150.05. The Sixth Circuit in *Northcross* v *Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979) and the Supreme Court in *Hensley* v *Eckerhart,* 103 S.Ct. 1933 (1983), both refer to compensation for "all hours reasonably expended" on a matter.

CONCLUSION

Both the Truth In Lending Act and the Retail Installment Sales Act provide for reasonable attorney fees. Plaintiff was successful under the Truth In Lending Act and the Retail Installment Sales Act. Plaintiff's claims were presented and pursued expeditiously. All the time spent was reasonably expended on good faith claims. Full compensation for the time spent by plaintiff's counsel in district court and on appeal should be allowed. A writ of certiorari to the Sixth Circuit Court of Appeals should issue.

Respectfully submitted,

By: /s/ BRIAN I. BROWN
Attorney for Petitioner
1504 South Vassar Road
Burton, Michigan 48509
(313) 742-1329

Dated: January 25, 1985

APPENDIX

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OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

— UNPUBLISHED —

(United States Court of Appeals
for the Sixth Circuit)

(Filed September 13, 1984 – John P. Hehman, Clerk)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

(FREDRICO [*sic*] LUNA, Plaintiff-Appellant v. HOUSE OF SOFAS and CITIZENS COMMERCIAL AND SAVINGS BANK, Defendant-Appellee — No. 83-1634)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Before: ENGEL and MERRITT, Circuit Judges;
GIBBONS, District Judge*

MERRITT, Circuit Judge. In this Truth in Lending Act case, plaintiff appeals the District Court's award of attorneys' fees on grounds that the court abused its discretion in determining the amount of attorneys' fees to which plaintiff was entitled. We find that the District Court's fee award was well within its discretion and therefore affirm.

The major dispute in this case concerns whether plaintiff is entitled to attorneys' fees for time spent in this matter prior to plaintiff's filing of an amended com-

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* The Honorable Julia Gibbons, Judge of the United States District Court for the Western District of Tennessee, sitting by designation.

plaint. It is undisputed that two years after this action was initially brought, defendant won a summary judgment as to all the issues in the case. It was not until this point that plaintiff amended his complaint to allege a proper claim under the Truth in Lending Act, 15 U.S.C. § 1640 (1982). The District Court held that plaintiff was not entitled to attorneys' fees for time spent on the case during the two years before he alleged the Truth in Lending Act claim, because plaintiff was not the prevailing party on any of the claims he alleged prior to that time.

It is well-settled that the amount of attorneys' fees to be awarded under the Truth in Lending Act is a matter of discretion for the trial court. *E.g.*, *McGowan* v. *King, Inc.*, 661 F.2d 48 (5th Cir. 1981). In the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), the Supreme Court recently held that the extent of a plaintiff's success is a crucial factor in determining the proper amount of attorneys' fees to be awarded, and that in cases where plaintiff's claims for relief involve a common core of facts or related legal theories, the District Court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Hensley* v. *Eckerhart*, 103 S.Ct. (1983). The Supreme Court explained: "If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 1941. We think this is such a case.

We find plaintiff's claim that he is entitled to compensation under the Truth in Lending Act for two years spent pursuing class certification and other issues on which defendant, and not plaintiff, prevailed, and during which he had not even stated a proper claim under the

Act, to be without merit. The District Court's award of $1787.05 in attorneys' fees, which includes compensation at the rate of $95 per hour for eighteen hours of work on the successful Truth in Lending Act claim, is a reasonable exercise of its discretion. Plaintiff's claim for $31,125, including a fifty percent contingency bonus and compensation for 162 hours at $125 per hour, is not reasonable. Accordingly, we affirm.

ISSUED AS MANDATE: November 6, 1984
COSTS: NONE

(*Certification omitted*)

OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division – Flint)

(FEDRICO LUNA, Plaintiff, v HOUSE OF SOFAS and CITIZENS COMMERCIAL & SAVINGS BANK, Defendant — NO.: 80-40382)

Plaintiff moves to reopen the case to determine a proper award of costs and reasonable attorney fees under 15 USC § 1640. Such motion is improper for two reasons: First of all, plaintiff fails to state a proper basis for setting aside the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Secondly, pursuant to both the order of June 29, 1983 and the order and stipulation of July 11, 1983, the Court has maintained jurisdiction over the unsettled issue of costs and attorney fees. Therefore, plaintiff's motion to reopen will be denied.

Plaintiff requests an award of $259.37 in costs plus attorney fees of $31,125 based on 166 hours of work at $125 per hour, plus a 50% bonus for the contingent nature of the work. While it is true that a prevailing plaintiff's attorney fees award need not be reduced because he did not prevail on each and every one of his Truth in Lending Act claims, *see, e.g., Postow* v *Oba Federal Savings & Loan Association*, 727 F2d 1370 (DC Cir, 1980); *McGowan* v *Credit Center of North Jackson, Inc.*, 546 F2d 73 (CA 5, 1977), it is also true that plaintiff did not assert the claim on which he prevailed until his amended

complaint of November 29, 1982, two years after filing his complaint and two weeks after summary judgment was granted defendant as to all Truth in Lending Act claims. Therefore, plaintiff was not a prevailing party before defendant's successful summary judgment motion and need not be awarded fees for that time period.

Following *Northcross* v *Board of Education of Memphis City Schools*, 611 F2d 624, 640 (CA 6, 1979), this Court will determine the fee award by considering the number of hours expended and the attorney's normal billing rate. The Court notes that *Northcross* merely establishes guidelines and that neither a contingency factor nor an inflation factor need be applied. *Louisville Black Police* v *Louisville*, Nos. 81-5466 and 81-5491 (CA 6, Feb. 4, 1983). Because only two days passed between the Court's granting plaintiff's motion to amend and defendant's first offer of settlement, no contingency factor will be considered. Furthermore, because of the short period of time between amended complaint and settlement, the award will not be adjusted for inflation.

Plaintiff's attorney has not provided the Court with his normal billing rate for Truth in Lending Act claims. Attorney fee awards in the Salem Mortgage Co. and Remvest Chapter VI cases are inappropriate comparisons with plaintiff's case. There is no basis for plaintiff's rate of $125 per hour. This Court has set an hourly rate of $85 per hour for Social Security cases. *See Sebert* v *Secretary of Health and Human Services*, No. 78-40054 (ED Mich, May 19, 1983). Keeping in mind the greater difficulty of a Truth in Lending Act suit, the Court believes that $95 per hour would be a reasonable rate for Mr. Brown's efforts.

Plaintiff's attorney will be credited with 18 hours of work performed beginning with the preparation of plaintiff's November 29, 1982 motion to amend the com-

plaint. As the time spent on submission of a fee is not an allowable expense, *see Esselstein* v *Director, Office of Workers' Compensation Programs*, 676 F2d 228 (CA 6, 1982) (applying the Federal Coal Mine Health and Safety Act of 1969, 30 USC §§ 801-962), plaintiff's attorney will not be compensated for the many hours he dedicated to briefs on his fees. Plaintiff will be awarded an attorney fee of $1,710 and costs of $77.05, with no reimbursement for the cost of depositions or phone calls made prior to November 29, 1982. Therefore, defendant will pay to plaintiff's attorney the sum of $1,787.05.

It is hereby ordered that plaintiff's motion to reopen be DENIED. It is further ordered that defendant Citizens Commercial and Savings Bank pay to plaintiff's attorney Brian I. Brown the sum of $1,787.05 for costs and attorney fees pursuant to 15 USC § 1640.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

Dated: 8/31/83

ORDER DENYING PETITION FOR REHEARING EN BANC, 10/29/84

(United States Court of Appeals
for the Sixth Circuit)

(Filed October 29, 1984 – John P. Hehman, Clerk)

(FEDRICO LUNA, Plaintiff-Appellant v. HOUSE OF SOFAS and CITIZENS COMMERCIAL AND SAVINGS BANK, Defendant-Appellee — No. 83-1634)

Before: ENGEL and MERRITT, Circuit Judges;
GIBBONS, District Judge*

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

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* The Honorable Julia S. Gibbons, Judge of the United States District Court for the Western District of Tennessee, sitting by designation.